IN THE SUPREME COURT OF FLORIDA

PATRICK C. HANNON, :

Appellant, :

vs. : Case No. 78,678

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On February 13, 1991, a Hillsborough County grand jury returned an indictment charging Appellant, Patrick C. Hannon, with two counts of premeditated murder. (R1672-1674) A superseding indictment was filed on March 27, 1991, charging Appellant and Ronald I. Richardson with the premeditated murder of Brandon Snider (Count One) and Robert Carter (Count Two), both offenses allegedly having occurred on January 10, 1991. (R1683-1685)

By executive order, the governor assigned the State Attorney for the Sixth Judicial Circuit to prosecute this cause in place of the State Attorney for the Thirteenth Judicial Circuit, apparently because one of the witnesses for the prosecution, Rhonda Abel, was employed by the Office of the State Attorney for the Thirteenth Judicial Circuit. (R1046,1678-1680,1686-1687,1831-1832)

Appellant was tried before a jury on July 15, 1991-July 24, 1991, with the Honorable M. William Graybill presiding. (R1-1634, 1657-1658) On July 23, 1991, Appellant's jury found him guilty of the two counts of first-degree murder. (R1577,1781-1782)

At the penalty phase held on July 24, 1991, the jury received additional evidence from the defense, and recommended to the court that it sentence Appellant to death for both murders. (R1587-1634, 1783-1784,1792)[1]

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[1] For unknown reasons, only the jury's written advisory verdict as to Count Two appears in the record (R1792); the written advisory verdict as to Count One is absent.

Appellant filed a motion for new trial on July 31, 1991 (R1803-1804), which the court denied on August 5, 1991. (R1639, 1803)

On August 5, 1991, the court sentenced Appellant to die in the electric chair for the murders of Brandon Snider and Robert Carter. (R1642,1806-1810,1811-1816) With regard to the murder of Brandon Snider, the court found three aggravating circumstances: (1) previous conviction of another capital felony (the contemporaneous murder of the other victim), (2) the capital felony was committed while the defendant was engaged in the commission of the crime of burglary, and (3) the capital felony was especially wicked, evil, atrocious or cruel. (R1806) The court found these same three aggravators applicable to the murder of Robert Carter, and additionally found that Carter was murdered for the purpose of avoiding or preventing a lawful arrest. (R1807-1808) The court found two mitigating circumstances applicable to each murder: (1) testimony of Appellant's mother, father and friend to the effect that Appellant had never been a violent person, had never tried to harm anyone, and had never hurt anybody in his whole life, and (2) that co-defendant Ronald I. Richardson, having agreed with the State to testify and then plead guilty to accessory after the fact, was "no longer facing murder charges as an initial accomplice when he also entered the dwelling of both victims with the intent to commit an offense against" the victims. (R1807,1809) The court specifically rejected Appellant's "residual or lingering doubt argument" as a mitigating circumstance (R1807,1809)

Appellant timely filed his notice of appeal to this Court on August 5, 1991 (R1820), and the public defender's office was appointed to represent Appellant in his appeal. (R1819,1827)

STATEMENT OF THE FACTS

State's Case

Brandon Snider and Robbie Carter moved into apartment 3301 in the Cambridge Woods Apartments in Tampa on October 8, 1990. (R373-374,377,398,1838-1839)

Around Christmas of 1990, Snider went to Indiana to visit relatives. (R399,566)

Toni Acker, who had lived with Brandon Snider for four and a half years, lived in Anderson, Indiana. (R741,744-745) Acker spent the night of January 8, 1991 at the house of a friend, and returned home the next afternoon. (R742-743) When she entered the house and went upstairs, she saw that all her drawers had been pulled out, and some things were missing. (R743-744,746) She saw damage to the residence that looked like bullet holes. (R744) There was a note on her bed, and a message on her answering machine from Brandon Snider. (R743-745)

Snider returned to Tampa the following day, January 9. (R566) He went to the Time Tunnel Pub that evening, and was very depressed. (R566-567) He told a friend, John Adinolfi, about what had happened in Indiana, although Adinolfi already knew about it. (R567) Snider left the Time Tunnel a couple of hours before Carter and Adinolfi did. (R567) Adinolfi took Carter back to his apartment, where they sat around and talked, then went outside and began wrestling and fell into a lake. (R568)

The next day, January 10, 1991, at about 5:20 p.m., the manager of the Cambridge Woods Apartments taped a "noise disturbance

letter" on the front door of the Snider/Carter apartment; other tenants had complained about the loud party the night before. (R377-379)

On the night of January 10, 1991, several residents of the Cambridge Woods Apartments saw and heard some unusual events. Larry Horton was lying on his living room floor at around 10:00 p.m. when he heard a crash, the "tingling" of glass, and some loud voices. (R270-271) He went outside to see if he could help. (R271) The blinds were pulled so that one could not see into the apartment from which the sounds were coming. (R272) Horton moved to a position where he could see into the apartment, and noticed an individual who was "blood covered." (R272-273) Horton could hear this person gurgling on his blood, and he sounded as if he were dying. (R272-273,285-286)[2] Horton could hear several male voices emanating from the apartment; he guessed there were three or four men inside. (R274-275) One of the men was saying something to the effect of let's reconsider this or let's talk about this. (R274) The men's voices seemed to be moving in an upstairs direction. (R276) A large downstairs window at the back of the apartment was broken and blood-covered, and an upstairs window at the front of the building was broken and had blood on it. (R272,277-278) Horton called to his wife to call the police, and asked a neighbor who had come out to call the security guard. (R273) Later that night,

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[2] Horton was a physician, but was not yet licensed in Florida. (R269)

Horton observed what appeared to be a blood spot on the outside of the open front door of the apartment. (R277)

Patrick Green and his wife lived next to Horton. (R289) They were in an upstairs bedroom at about 10:00 p.m. on January 10, 1991 when they heard a disturbance, windows broken, yelling. (R289) Sounds like arguing and fighting were apparently coming from downstairs by the rear window of another apartment. (R290) There were at least two, and possibly more, male voices inside the apartment. (R289-290) Green heard the downstairs rear window break, and then heard somebody yell from inside the apartment, "'Oh my God, my guts are hanging out.'" (R289-290) The Greens then called 911. (R289) A little bit later Green heard what sounded like gunshots. (R291) He called 911 again, then went downstairs to where Horton was. (R291-292)

Michael Egan lived in apartment 3701 with two roommates. (R293-294) At approximately 10:00 on January 10, 1991, or a few minutes after, he and a friend, Shane Cohn, went to the clubhouse to get some sodas. (R294-295,344) As they were returning to Egan's apartment, they saw three men coming out of a walkway, walking fast. (R295,302-303,344,348) They were about 25 to 30 yards from the apartment in question, and were walking away from it. (R298, 345) The men did not look like the other people who lived there, most of whom were university students who wore nice clothes and had well-kept appearances. (R295-296) The three were "real scummy looking," with "ratty" clothes and an unclean appearance. (R295-296) Egan notice a big-boned individual with a beard more than the

others. (R296) This man was the last of the three as they were walking. (R289-299) Egan said the man was around six feet, one inch tall and weighed around 200 pounds, while Cohn described him as being about five feet, ten inches to six feet tall and weighing 200 pounds. (R307,349) He was wearing jeans, a T-shirt and tennis shoes. (R296) He had long greasy hair, probably a little past shoulder length. (R296) The man put something metallic in his pants that Egan thought was a "slim-jim," and then folded his arms. (R296-297) When Egan and Cohn approached behind the men, one in front said in a muffled voice, "Look, look." (R299) The big-boned man said, "Go, go, go, go," and the men began walking very fast. (R299, 302-303) They got into a car that looked like a Ford Fairmont, which was parked very far away from the apartment in question, and drove away. (R298-299,304,347-348)[3] The police arrived 30 seconds or so after they left. (R304)

Pamela Deimund lived in apartment 3205 at Cambridge Woods. (R315) Snider's and Carter's apartment was approximately 100 feet away from hers, and their front door faced the back of Deimund's apartment. (R315-316) Around 10:00 on the night of January 10, 1991, she heard unusual sounds coming from their apartment: fighting noises, things being banged around, glass breaking, and six, seven or eight popping noises that sounded like a cap gun or pop gun. (R316-317) Deimund looked out her bedroom window and saw two people leaving the front door of the apartment. (R317,337) The man

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[3] Cohn identified Appellant in court as the person with the beard he saw that night; Egan approached Appellant in the courtroom and said that he could be the man he saw that night. (R346,310-311)

in front was big and burly, with dark hair down to at least his shoulders and a full beard. (R320-321) He was wearing a T-shirt and blue jeans. (R320) His arms were crossed over his abdomen as if he were holding his stomach. (R317-318) The second person was taller and thinner. (R321) When Deimund opened her front door, she sw three men walking swiftly away from her to the back parking lot. (R319) They drove away in a big, four-door automobile. (R322-323) After they left, Deimund saw blood on the front door of the Snider/ Carter apartment. (R323-325)

Keefe Roberts lived in apartment 3603 at Cambridge Woods. (R351-352) He was in the parking lot on the evening of January 10, 1991 at a little after 10:00 when he noticed three individuals coming from apartment 3301 walking "very fastly" toward him. (R351-352) He got the best look at the largest one, who was leading. (R352) He had long dark hair and a long beard. (R352-353) He was bend over holding his stomach. (R352-353) The three people got into a Ford Fairmont. (R354,358)[4]

Deputies Shoemaker and Swoope of the Hillsborough County Sheriff's Office initially responded to the Cambridge Woods Apartments, arriving there at approximately 10:05 p.m. (R425-426) Shoemaker observed blood on the outside of the door to the apartment in question, and saw that the living room window and the upstairs bedroom window were broken. (R426,428) Downstairs in the apartment they found a deceased white male lying on the floor by the stair-

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[4] Roberts could not "exactly identify" anyone in court, but he was "pretty sure" that Appellant was the man with the beard whom he saw on January 10. (R355-356)

case. (R427) He had been cut severely across the throat, and had wounds to the left arm and left side. (R427) Upstairs in the bedroom under a bed, Swoope and Shoemaker found another person who had six gunshots in his left side. (R430-431) He had a faint pulse and was gasping as though he needed air. (R429-430) By the time the paramedics from Hillsborough County EMS arrived at about 10:20 p.m., the white male upstairs had also expired. (R430-431,435-436)

Dr. Diggs, the Deputy Associate Medical Examiner for Hillsborough County, responded to the Cambridge Woods Apartments, and later autopsied the bodies at his office. (R492-496) He found a total of 14 stab wounds and cutting wounds to Brandon Snider's chest, abdomen, and back, with one of the wounds being a deep cutting of the neck. (R496-497) All the wounds, which were made by a sharp object such as a knife, were potentially lethal. (R495-497, 501) Snider could have survived for a period of time after the wounds, but Diggs estimated that once he was cut on the neck, Snider only survived 17 to 24 seconds, because that is about how long it usually takes for blood to complete one cycle in the body, and death, or certainly blackout, would have ensued. (R501,519)

Dr. Diggs found that Robert Carter had incurred six gunshot wounds that basically extended in a straight line down from his left armpit. (R501-502,511-512) Four of the wounds were contact wounds, and two were very close range. (R513-514) They produced massive internal hemorrhage which caused Carter to go into shock and expire. (R501-502) Each shot was lethal. (R502) One could have survived as long as five or six minutes after these shots, but

the great majority of them would tend to render one unconscious and then dead in a matter of minutes. (R502-503)

At approximately 1:30 on the morning after the homicides, Shane Cohn, Mike Egan, Pamela Deimund, and Keefe Roberts participated with Detective Roslyn Kroll of the Hillsborough County Sheriff's Department in making a composite of the person with the beard that they had seen at Cambridge Woods. (R380-386) It took about an hour to arrive at a final product. (R384) They had difficulty getting the hair right, and the beard, which was not long enough in the composite. (R308-309,327-328,349-350,355,359-360,384,386)[5]

On January 14, 1991, Detective Mozell Linton of the Hillsborough County Sheriff's Department flew to Anderson, Indiana. (R961-962) She interviewed Toni Acker there on January 16. (R758, 963-964) Acker had been friends with Appellant for six or seven years, and had been friends with Ron Richardson for eight years. (R741-742) On cross-examination at Appellant's trial, Acker said that State's Exhibit Number 37 did not look like Appellant; he never had a beard that long. (R748-749) On redirect, Acker denied telling Detective Linton that the composite resembled or looked like Appellant. (R759) The prosecutor also asked Acker whether she told Linton during the interview that she (Acker) had contacted her brother, Jim Acker, with reference to Appellant being involved in the murders, to which Acker responded, "No, I did not." (R763) Defense counsel objected and moved for a mistrial, stating that the

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[5] A photograph of the composite was admitted into evidence as State's Exhibit Number 37. (R385)

prosecutor had blurted out something that was highly prejudicial. (R763-766) The court denied the motion for mistrial, but stated that he might revisit the matter if the State failed to call Detective Linton to impeach Acker. (R766) The prosecutor then asked Acker the following questions and received the following responses (R766):

> Q. After you learned about the murder of Mr. Snider and Mr. Carter, did you have occasion to ask your brother, Jim Acker, about the possibility of Hannon's involvement?
>
> A. No, I did not.
>
> Q. At that interview that we've already talked about in Anderson, Indiana on January 16th, beginning at 9:40, did you tell Detective Mozell Linton that you had asked your brother Jim about Hannon possibly being involved?
>
> A. No, I did not.
>
> MR. LEWIS: I don't have any other questions.

During the direct examination of Detective Linton, the prosecutor asked her, over defense objections, the following questions with reference to her interview with Toni Acker, and received the following answers (R964-970):

> Q. Detective Linton, when you showed Toni Acker the composite photograph, what did she say about it?
>
> A. She said after looking at it, she thought it looked like a person known to her as Patrick Hannon that lived in Tampa.
>
> Q. And what did she say, if anything, about a beard and a mustache?

A. She said he fit the physical description of being a big man, that he had long dark hair and a full beard and mustache.

Q. Did she make any statement about having asked her brother, Jim, about Hannon possibly being involved?

A. Yes.

Q. And what did she say?

A. She told me that she had had a conversation with her brother over the phone, that she had called down to Tampa after thinking about this case and asked her brother, Jim Acker, if he thought Patrick Hannon had been involved in killing Brandon and Robbie.

Detective Linton interviewed Appellant on February 1, 1991. (R972) Appellant stated that he knew the victims, and had been to their apartment once between Christmas and New Year's Day, but that he did not know anything about the murders, or who might have committed them. (R973)

Also on February 1, Detective Linton showed a photopack consisting of six pictures, one of which was a photograph of Appellant that she took when she met with him earlier that day, to Shane Cohn and Mike Egan, but they were unable to make any identification from the photopack. (R972,976-979,1022-1023)

On February 6, 1991, Royce Wilson, latent fingerprint expert with the Hillsborough County Sheriff's Department, identified a print on the stairwell wall of the victims' apartment as matching Appellant's left palm, and identified a print on the inside of the front door of the apartment as matching Appellant's left ring finger. (R627,650-654,659) Both prints were in what appeared to be blood. (R646-648,650-651,653-654) Wilson did a presumptive test

for blood on the door, but not on the stairwell. (R652,667-669, 673,676-678)

Appellant was arrested at his residence on the night of February 6, 1991. (R980-981,989) Upon being questioned by Detective Linton, Appellant stated that he was not guilty and did not know why Linton was arresting him. (R993) When Linton told Appellant that his palm print had been found in blood on the stairway, and showed him a photograph of where it was found, Appellant appeared "concerned." (R994)

Appellant's residence, which was a small travel trailer, was searched the night of his arrest. (R996) The search produced no blue jeans, guns or knives; there was very little in the trailer apart from a few pieces of clothing. (R996,1010-1011)

The State presented several witnesses at Appellant's trial to testify to statements Appellant allegedly made while in jail after his arrest on the instant charges. Jerry Robinson testified that he resided in the same cell with Appellant at the Hillsborough County Jail from February 25 to March 7, 1991. (R866) According to Robinson, Appellant told him that he (Appellant) and a friend or friends went to a party at a house or apartment, where "somebody got killed, some man's neck got cut, and one got shot" six times sitting on or under a bed. (R867-871) Appellant also mentioned a '69 or '72 green Chevrolet that was not his, but did not say how the vehicle was used. (R868-869) Appellant also told Robinson that he had had a beard, but shaved it off before he came to jail, and

Robinson could tell by his skin tone that Appellant had indeed had a beard. (R868-869)

Rodney Green testified that he was in the same cellblock with Appellant for approximately four days in the early part of February, 1991. (R876) When they discussed Green's case, and he mentioned that he was in jail for grand theft and illegal hunting, and that someone had testified against him, Appellant remarked that Green should never have left any witnesses. (R876-877) Appellant said this about three times during the four days that they were incarcerated together. (R877) Appellant also said that "they were partying together," but Green did not know who Appellant meant by "they." (R877) Green admitted on cross-examination that when the State first came and talked to him, he made up a bunch of "crap" about Appellant because he wanted to get his sentence reduced. (R877-878) Green had not been promised anything for his testimony. (R878)

Larry Crocker was in the same cell or cellblock with Appellant for two days around February 7, 1991. (R880) Appellant told Crocker that he didn't do it, that some of his friends were involved in it. (R880) Appellant similarly told his other cellmates that he did not do it, but that he knew the people that did it, and that he knew the people that were killed. (R880-881) On one occasion Appellant was pulled out of his cell. (R881-882) When he came back, he told Crocker that a detective had approached him with a photograph of a print in blood that they said was his. (R882) Appellant was agitated; he said the print was not his, that it was

not him. (R882) On another occasion Crocker overheard a telephone conversation Appellant was having. (R882) Crocker "gathered" that Appellant had co-defendants, because Appellant told someone on the telephone to "stick with the same story." (R882) Crocker testified that he did not want to leave the institution where he was incarcerated to come to Hillsborough County to testify in Appellant's case, because he feared he would lose some gain time. (R883-885, 887) However, the State essentially gave him an ultimatum, and told him that if he testified voluntarily, they would get him back to the institution in sufficient time that he would not lose gain time, but that if they had to subpoena him, he might not get back in time to avoid losing some gain time. (R883-885,887)

Michael Keever was in the same cell or cellblock with Appellant for a few days during the first part of February, 1991. (R889) Appellant told Keever that the only thing they had against him was a palm print that the police mistakenly said was left in blood. (R890-891) Appellant said that he had been in the apartment a couple of days before the incident occurred and left a clean print, and whoever committed the murder smeared blood over the top of it. (R890-891) Appellant said that he did not do it; he did not say that he knew who did it. (R890)

Jonathan Ring testified that he was in the same cellblock with Appellant during February and March of 1991. (R892-893) Appellant discussed his case with Ring and said that he was pretty sure that he would "get off," because the only evidence they had against him, really, was a bloody handprint, and because they had not checked to

see if it was human blood, Appellant was sure that he could get it thrown out of court. (R893-894) In discussing the victims, Appellant told Ring that "the one guy was a real jerk, that he didn't think there was going to be anybody that would really miss him." (R894) Appellant stated that the other victim was "a pretty nice guy" who was "just in the wrong place at the wrong time." (R894) Appellant also told Ring that one of the victims had gotten his throat cut, and that the other had been shot, and that they would never find the weapons. (R894) He said that the cops "were making a big deal out of it because he had cut his hair and shaved his beard just a few days before they talked to him," and indicated that his hair and beard had been pretty long before he got them cut. (R896) Appellant also stated that the cops were trying to pin a murder on him because "he had worked in a slaughterhouse and he was cutting throats for a living, because that made him a violent person," and that he was supposed to have cut one person's throat and shot the other six times. (R896-897) When Appellant talked about one victim having his throat cut, he made gestures with his left hand in a fist and a slashing motion with his right hand. (R896-897) When he talked about the other victim having been shot, he pointed to his side and brought his fingers up in a straight line from the waist. (R898-899) Ring and Appellant also discussed the possibility of the State being able to come up with any witnesses against Appellant, and Appellant said that "there was one person that if the State got in touch with, or got ahold of, that he would fry." (R899) Appellant did not mention her name, but said

that the night of the murder at the party, a girl "had overheard them talking and said something about--something to the effect of, 'Well, who are you planning on killing?'" (R899-900) Appellant was "real worried about that person coming forward." (R900) On another occasion Appellant was "very strongly upset" when he returned from a visit with his lawyer. (R903) Appellant wanted to get in touch with his sister to have her give a message to somebody to go by the same story that had been discussed; Appellant was concerned that that person would testify against him. (R903-904)

When the State initially pulled prisoners out of their cell in March and asked if they had heard Appellant say anything about the offenses, Ring told them that he could not think of anything off hand that would help their case. (R905-906) Appellant kept a very thick file of police reports in his cell; Ring had read part of it, and Appellant let other prisoners read it as well. (R905,907-908) Appellant never told Ring that he did the crimes, and did not say that he knew who did it. (R905)

Keith Fernandez testified that he was incarcerated in the Hillsborough County Jail on or about February 25, 1991, and Appellant was one of the people in the cell with him. (R769) During the course of a card game one day after there had been an article in the newspaper about this case, there was some discussion as to where the murder weapons were located. (R771) Appellant said, "They'll never find them." (R771) On another occasion, Appellant asked, "'Well, Keith, say you knew someone that was real close, like a family member, you know, and you knew something about some-

thing, what would you do?'" Fernandez answered, "Well, if it was me--if it was me on the line, I would think about myself." (R771-772) Fernandez also testified regarding a telephone conversation Appellant had with his sister. (R774-775) A friend of Appellant's apparently was "getting real nervous" because the "cops were harassing him." (R775) Appellant "looked like he was almost ready to cry because he said something about the guy was going to roll on him, or something, and lie about him and send him to the electric chair." (R775) After a meeting with his lawyer, Appellant came back and told Fernandez that his lawyer told him that they had a palm print on the wall, but they could not use it "because it was just in, like, the corner of the palm." (R777-778) Another time, Appellant said that "it looked like he just took his finger and dipped it in blood and was trying to shut the door. He said it was his fingerprint, but the guy ran it over and they forgot to test it to see if it was human blood or not, so they couldn't use that." (R778) On yet another occasion, Appellant mentioned that if they found a girl named Robin, "it would blow his alibi out of the water, send him to the electric chair." (R772) Fernandez figured out who "Robin" was, and assisted the authorities in locating her residence. (R773-774)

Detective Linton thereafter spoke with Robin Eckert on several occasions. (R997-999) Eckert testified at Appellant's trial that she and Kamla Allersma worked at Time Magazine. (R790-791) On January 10, 1991, they went to work at 3:30 a.m. as usual, and got off at approximately 1:15 p.m. (R791) They spent part of the afternoon

at M.B.'s Lounge, and later went to the home of a friend of Eckert's, Ron Richardson. (R792-795) No one was home, and so they waited on the front porch. (R795) Shortly after 5:00, Ron Richardson, his brother, Mike, and Maureen Hannon (Appellant's sister) arrived in Mike's car. (R796) They all entered the house, and Eckert introduced Allersma to them. (R797-798) Richardson took some meat into the kitchen, where he put some of it away, and started cooking some. (R797-798) There was no beer, but Appellant said that he had a few at his house, and he left for a short period of time, returning with a partial 12-pack. (R798) Two men Eckert did not know came to the house at approximately 6:30 or 6:45. (R800) Eckert got a good look at one of them, who was introduced to her as "Jim." (R800) While Eckert, Mike Richardson, and Kamla Allersma were in the living room, and the others were in the kitchen talking, Eckert observed Appellant making hand signals, as though the men in the kitchen did not want the others to hear what they were talking about. (R804-805)

At approximately 7:30, Appellant, Ron Richardson, "Jim," and the other man whom Eckert did not know, left the house. (R805,807) Eckert did not see them with any weapons. (R859) They were gone a long time; Eckert watched "Cheers," "Night Court," and a movie on television (R808-809) Eventually, Richardson, Appellant, and "Jim" returned; Echert never saw the fourth man again. (R809) The men did not tell Eckert where they had been, or talk to her at all. (R810) Eckert did not notice blood on anyone's clothing. (R859)

Eckert went to the restroom, and when she came out, Jim was standing in the front doorway, Appellant was next to the door, and Ron Richardson was standing next to him. (R810-811) Eckert walked up behind them and heard one of the men, she was almost sure it was Ron Richardson, say to Appellant, "'We murdered 'em.'" (R811-812) Eckert thought it was a joke and asked, "Murdered who?" (R812) Appellant looked at her; he looked shocked. (R813) Richardson turned around, grabbed Eckert by the shoulders, told her to keep her big mouth shut or they would murder her son, told her it was 8:30, it was time to go to the bar. (R813) Eckert left with Allersma.(R813) She did not discuss with Allersma what Richardson had said to her, nor did Allersma give any indication that she had overheard. (R813-814) They went to M.B.'s Lounge, arriving there at approximately 11:50 or 12:00. (R814) Eckert did not have any money, but Thursday night was "ladies' night," and she was able to drink for free. (R814)

Eckert acknowledged that she did not tell the truth when she was initially questioned by the sheriff's deputies; she told a number of lies when she was questioned on March 8, 1991 and March 13, and March 19, 1991. (R818-822,847-827) However, she was eventually subpoenaed to testify in front of the state attorney, and gave a sworn statement as to what had happened. (R822-824) Eckert also admitted on cross-examination that she completed an application for food stamps in December, 1990 on which she was required to list all sources of income, which she failed to do. (R860) She could have been charged with a crime for not filling out the application

properly, but she had not been so charged. (R860) No one had promised not to charge her with a crime in exchange for her testimony. (R860-861)[6]

Ron Richardson, Appellant's co-defendant, was arrested on March 19, 1991. (R999,1014) He was expected to be a defense witness at Appellant's trial, but initially invoked his Fifth Amendment privilege not to incriminate himself. (R985-989) However, Richardson ultimately testified as the final witness for the prosecution, after his attorney had negotiated an arrangement with the State which called for Richardson to enter a plea to one count of "accessory after the fact," and be sentenced to five years in prison, in return for Richardson's testimony in Appellant's case (R1139-1218)

Richardson testified that on January 10, 1991, he was working at La Casa Sierra Meat Packing House. (R1169) He drove home from work with his brother and Maureen Hannon. (R1169) Robin Eckert and Kamla Allersma were waiting for him on the porch. (R1169) They all went inside the house. (R1170) Maureen Hannon left shortly, and her brother, Appellant, arrived at about the time she was leaving. (R1170) Richardson had brought some beer with him, and Appellant had some beer in his car, which he brought in. (R1170) Jim Acker arrived at the house around 7:30 or 8:00. (R1171-1172) Acker,

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[6] On cross-examination, defense counsel asked if everything Eckert put on her application for the job with Time wasn't a lie, and she said that it was, but the trial court ruled that counsel was attempting improperly to impeach the witness on a collateral matter, and instructed the jury to disregard the question and answer. (R827-850)

Richardson, and Appellant had been friends for five or six years. (R1171) Appellant had worked with Richardson at the La Casa Sierra Packing House and Okeechobee Packing House. (R1171)

Richardson barbecued some pork, and after they ate the pork, they sat at the table, drinking beer and talking. (R1174-1175) Eckert and Allermsa left around 8:30 or 9:00. (R1175) Richardson, Appellant, and Jim Acker left the residence in Mike Richardson's LTD. (R1175,1212) About two or two and a half hours had elapsed since Acker arrived. (R1210) Acker was driving, Richardson was in the front seat, and Appellant was in the back seat. (R1176) Richardson did not see any knives displayed by anyone before they left the house, but Appellant went to Richardson's bedroom and took a .380 semi-automatic pistol from Richardson's top drawer and remarked that he wanted to take it with him. (R1176-1177) Richardson normally kept the gun unloaded, but when he saw Appellant with the gun, the clip was in it. (R1177) Appellant put the gun inside the front of his pants. (R1177-1178) They drove to Snider and Carter's apartment complex and parked. (R1178) Richardson had been to the complex twice before, and had been to Snider's and Carter's apartment once, in December. (R1178) They got out of the car and walked the block or block and a half to the apartment. (R1179) Acker stood off to the side and Appellant knocked on the door. (R1179) Brandon Snider opened the door. (R1179) Appellant entered first, followed by Richardson, then Acker. (R1179-1180) Acker came between Richardson and Appellant and started stabbing Snider, who was just about to sit back down on the couch. (R1180) Acker stabbed

him several times, and Snider slammed into a window. (R1181) Snider walked to the bottom of the stairs and said to Robbie Carter, "Call 911. My guts are hanging out." (R1181) Acker went into the kitchen; Richardson assumed he was washing his hands. (R1181,1208-1209) Appellant went behind Snider and put his arm around his neck. (R1811) Richardson looked up and saw Robbie Carter, who said, "Jim, let me get out of here." (R1181) When Richardson looked back down, he saw Snider on the floor, not moving. (R1181-1182) Richardson heard a funny, "hasping" noise, and saw that Snider's throat was cut. (R1182-1183) It had not been cut before Appellant went over to him. (R1183) Richardson did not know where the knife was at this time. (R1182) [In his statement to the prosecutors the day before his trial testimony, Richardson had told them that he was not sure about the throat being cut; he said that he did not see any wounds to Snider's throat. (R1184,1210)] Carter went back up the stairs, and Acker followed him. (R1182) Appellant had released Snider, and Appellant went up the stairs with the firearm in his hands. (R1185) Richardson heard some shots and some "hollering," but he could not tell where the hollering was coming from. (R1185-1186) He left the apartment, and was joined by Acker and Appellant. (R1186) They got into the car and Acker drove them back to Richardson's house. (R1186-1187) There was no conversation after they left the apartment. (R1187) At Richardson's residence, Acker and Appellant washed themselves and changed their clothes, which had blood on them. (R1187) Appellant was more bloody than Acker. (R1187) The clothing was put into a brown paper bag.

(R1189) The three proceeded to Maureen Hannon's house in Acker's pickup truck, stopping along the way so that Appellant could throw the gun and the knife into the river. (R1188-1189). The knife was a fold-up knife, like a Buck knife. (R1189) At Maureen Hannon's house, Appellant took the brown bag and went into the back yard, while Acker and Richardson went to buy some gas. (R1189) When they returned from the gas station, the clothes were already burning. (R1189-1190) Appellant was in the back yard with his sister. (R1190) They never told Maureen what happened. (R1190)

The three men then returned to Richardson's house. (R1190) Mike Richardson was asleep on the couch. (R1202) Acker left, but Appellant stayed. (R1190) Both Richardson and Appellant went to work the next day. (R1191) Richardson saw Appellant at his sister's house that afternoon, which was Friday. (R1191) Appellant told him that he had shot Robbie Carter and had cut Brandon Snider's throat, which he said was just like taking a pig's head off. (R1191-1192)

On cross-examination, Richardson acknowledged that he had lied to Appellant's attorney when he gave him a statement on February 21, 1991. (R1193-1194) Richardson had told defense counsel that he and Appellant had nothing to do with the murders. (R1194) He stated that Eckert and Allersma were at his house on Wednesday, rather than Thursday (which was the day of the homicides). (R1194) He further told Appellant's lawyer that he and Appellant played quarters on the night in question until 10:00, when Appellant went to sleep. (R1194-1195) Richardson also acknowledged lying to a

detective that he had nothing to do with the offenses and knew nothing about them. (R1196-1197)

Richardson testified that he was six feet or six feet one-inch tall, and weighed 200 pounds. (R1204) He always kept his beard trimmed. (R1204)

Richardson denied ever threatening Robin Eckert, and denied making the statement, "We murdered 'em." (R1204)[7]

Defense Case

Kamla Allersma testified that Robin Eckert's reputation for truthfulness was that she was a liar. (R1236) Allersma said that she did not hear any threats made against Eckert on the night in question; her parting with Ron Richardson seemed to be friendly. (R1238,1243) Allersma also stated that Eckert did not go to the bathroom when the three men returned that night. (R1243) On the way to M.B.'s that night, Eckert did not appear to be shaken; they laughed and joked. (R1238) Eckert had mentioned earlier that she wanted to go back to Richardson's house, but Allersma said that she would rather not, because she did not feel comfortable there. (R1238) Eckert later asked Allersma to lie about where she had met Richardson that night. (R1240,1244)

On cross-examination, Allersma said that the composite was "about what he [Appellant] looked like" when she saw him at Ron

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[7] Among the evidence the State presented at Appellant's trial in addition to that which has been discussed in the Statement of the Facts was the testimony of Judith Bunker, a forensic consultant in blood stain pattern analysis and crime scene reconstruction, which was admitted over defense objections that it was irrelevant and inflammatory. (R1072-1127)

Richardson's house; he looked "straggly" and unkempt, but his hair was not real long, not shoulder length. (R1247,1249) Appellant's beard was longer than what was shown in the composite. (R1252)

Michelle Acker, Jim Acker's wife, testified that she had known Appellant for three to three-and-a-half years, and State's Exhibit Number 37 (the composite) did not look like him. (R1261-1262) She had never seen him with hair and beard that long. (R1262)

On the night of January 10, 1991, Acker's husband was home all night from about 8:15 on. (R1263)

Just before Christmas, 1990, Acker went to Robbie Carter's apartment and dropped off a Burger King lunch. (R1264-1266) She assumed that Carter, her husband, and Appellant were there, because they all left from her house in one car, which she saw at Cambridge Woods. (R1265)

Toni Acker testified that the report Detective Linton wrote on their interview contained 24 errors and inconsistencies, "plus a lot of stuff she left out." (R1269-1270) When Linton showed her the composite, Acker told her that the hair was too long, that Appellant never had a beard like that, and that the nose was totally wrong. (R1270-1271) Acker never indicated to Linton that she thought Appellant was a suspect in the death of Brandon Snider, Acker knew that Appellant would not do that, but she did give Linton the names of several possible suspects who had something to do with drugs. (R1271-1272,1276-1277) Snider was somewhat involved with drugs, and had been known to steal drugs, and Acker told Lin-

ton that his killing had to be drug-related because of the way he was killed. (R1272)

Snider abused Acker during their relationship; when they were in Tampa, she suffered a broken jaw, broken arm, stitches to her knee. (R1271-1272) She never knew Appellant to do anything to Snider as a result. (R1272)

Several times Appellant had brought pork loins to various locations and shared them with his friends. (R1275) He got these pieces of meat from the slaughterhouse where Ron Richardson worked, and they were bloodier than the meat one would buy in a supermarket. (R1275-1276)

When Brandon Snider returned to Tampa from Indiana on January 9, he called Acker from the airport and apologized for what he had done. (R1278) He said he was going to send money for the damage he had done to Acker's mother's house, and return the things he had taken. (R1278) Snider talked about death a lot, but he did not really seem to be in fear when he called from the airport. (R1279)

Dr. Diggs testified for the defense that he did a drug screening on the body of Brandon Snider, which revealed the presence of nicotine, benzodiazepines (Valium), and barbiturates, but no cocaine or marijuana. (R1291-1294)

Detective Roslyn Kroll testified for the defense that on June 21, 1991 at the Hillsborough County Jail, she questioned six fellow inmates of Appellant. (R390) She showed them a photograph of Appellant and asked if they had heard him say anything about his case, but none of them gave her any information. (R390)

Marcus Jordan testified that he was in Appellant's cellblock at the jail. (R1305) Appellant had police reports in his cell which Jordan and other inmates, including Keith Fernandez, read through. (R1305-1307) During the jail sweep when the State questioned all the prisoners, Keith Fernandez said, "Whatever it takes for me to get out, I'm going to do that." (R1306-1307)

Louie Cata was also in the same cellblock with Appellant. (R1311) Cata never talked to him about his case, and never saw him talking to anybody else about his case. (R1311-1312)

Steven Johnson was in the same cell as Appellant in June, 1991. (R1313-1314) Johnson never talked to him about his case, and never saw him talk to anyone else about his case. (R1313)

After Jesse Porter's arrest on June 14, he was in the same cellblock as Appellant. (R1315) He did not talk to Appellant about his case, and did not overhear him talking to anyone about his case. (R1315)

Marco Lopez was in the same cellblock as Appellant after Lopez was arrested on June 10, 1991. (R1333-1334) He never talked about his case with Lopez, nor did Lopez hear Appellant talking to anyone else about his case. (R1333)

James Smith was arrested on June 14, 1991, and was in the same cellblock with Appellant at the county jail. (R1334-1335) Smith never talked with him about his case, and never overheard him talking to anyone else about his case. (R1335)

Arthur Horne testified that he had known Appellant for about a year and two months. (R1322-1323) State's Exhibit Number 37 (the

composite) did not look like Appellant. (R1323) His hair had never been to that length, and Appellant's full beard, which he kept cut pretty close to his face, was never as thin and "straggly" as the beard shown in the composite. (R1323) On January 10, 1991, Appellant weighed between 295 and 305. (R1325) Horne saw Appellant at his house on the morning of January 11, 1991; they went to work together. (R1323-1324) Appellant was wearing the same shoes he had worn all week. (R1332) Horne did not see any blood on them. (R1332) When a broadcast about a homicide came over the airwaves, Appellant did not react in any unusual way. (R1324)

Horne had had occasion to see Appellant take from his refrigerator pork loins that Appellant had obtained from a "butcher place" in Pasco County where Appellant worked with Ron Richardson. (R1324-1325) Horne had discussed Appellant's reputation for non-violence with Horne's roommate, Paul Kilgore. (R1327,1330) Horne always referred to Appellant as "kind of a big teddy bear-type person." (R1327)

Horne had seen Appellant with Toni Acker, but could not say that he dated her. (R1328) Horne acknowledged that he may have told the State that he believed that Appellant was "sweet on" Acker. (R1329)

James Acker testified that he was home with his wife and son on the night of the homicides. (R1337) The night before that, he, Appellant, Mike Richardson, and two girls, one of whom was named Robin, were at Ron Richardson's house, drinking beer. (R1337) Acker denied participating in the homicides of Brandon Snider and

Robbie Carter, and he had not been arrested for these offenses. (R1337-1338) He did not own a folding Buck knife. (R1337)

The composite did not look like Appellant. (R1337-1338) Acker had never seen Appellant with a long beard or hair like that. (R1338)

Sometime around Christmastime, Acker was with Appellant at the Snider/Carter residence. (R1338-1339) Appellant brought a pork loin from the butcher shop where Ron Richardson worked, because they were going to have a barbecue. (R1339) They never got around to having the barbecue, however, and Appellant cut up the pork loin so that he could leave half of it with Carter. (R1339)

Acker remembered that Snider broke Toni Acker's jaw two or three years ago. (R1339-1340) Acker did not do anything to Snider when he did that. (R1340) Acker did not hate Snider, who was once a friend of his; he more or less stayed away from him. (R1340) Acker was upset about what Snider did to the house in Indiana where his sister and mother lived, but he was not mad enough to stab Snider 13 times and cut his throat. (R1342-1343) Robbie Carter was a good friend of Acker's, and he could not shoot him six times. (R1340)

Appellant's sister, Maureen Hannon, testified that she was home in bed at the time the homicides supposedly occurred, and she did not see Appellant that night after 10:00. (R1354) It was January 9, 1991 that she and the Richardson brothers arrived at Ron Richardson's house to find Robin Eckert and Kamla Allersma waiting for them on the steps. (R1362-1363) The composite did not look

like her brother; his hair and beard had never been quite that long, and his cheekbones were not as full as those shown in the composite. (R1364) Maureen had never known her brother or Jim Acker to carry a folding Buck knife. (R1364-1365)

Appellant testified that he was 26 years old, six feet, three inches tall, and weighed 305 pounds, which was about what he weighed on January 10, 1991. (R1366-1367) He went as far as the eleventh grade in school. (R1367)

Before Appellant's arrest, he was living in a travel trailer adjacent to the house in which Arthur "Rusty" Horne and Paul Kilgore lived. (R1367)

Appellant knew both Brandon Snider and Robbie Carter well. (R1367) He got along great with Snider most of the time, except that Snider would become a "little obnoxious" when he got drunk, but he was actually a "pretty mellow person," who never argued and fought with anybody. (R1367-1368) Carter was the same way, but he drank most of the time. (R1368) Carter was on house arrest, and Appellant more or less stayed away from him, because he did not want to get him into trouble. (R1368)

On January 10, 1991 at 10:00, Appellant was at Ron Richardson's house playing a drinking game called "Quarters." (R1368) They quit at a little after 10:00, and Appellant spent the night on Richardson's couch, because he was "pretty drunk" and did not want to drive, and the lights were not working very well on his car. (R1368-1369) Appellant said that he was not involved in this

double homicide "in any way at all," and did not have any idea who did it. (R1369)

It was Wednesday, January 9, 1991 that Appellant was at Ron Richardson's house when Robin Eckert, Kamla Allersma, Jim Acker, and Mike Richardson were there. (R1379) Appellant did not stay late, because he had to work the next day. (R1380)

Appellant did not have any romantic interest in Toni Acker; they were just friends.(R1370)

Appellant worked at various jobs, including at the slaughter-house with Ron Richardson. (R1371) His job was to shock the animals and make a small incision to bleed them. (R1371-1372)

Appellant was at the Snider/Carter apartment either the weekend before or the weekend after Christmas, with Jim Acker and Robbie Carter. (R1372) Appellant took a pork loin, which they were going to barbecue, but which they did not have a chance to do, because Acker had to leave to cover a pool table. (R1373) Appellant therefore boned out half of the meat for Robbie Carter and cut him some pork chops. (R1372-1373) Appellant went upstairs in the apartment to use the bathroom. (R1374) It was "most definitely" possible that Appellant used his hands to guide himself when he came back downstairs, because the stairway was very steep, and he had been drinking a lot. (R1374-1375)

Appellant testified that he never grew his beard as long as what was described; an inch was about as long as he ever grew it. (R1376)

Appellant recalled hearing a television broadcast about a homicide on the morning of January 11 that mentioned the Cambridge Woods Apartments. (R1381) Appellant remarked to Rusty Horne that he knew somebody that lived there, but Appellant did not really pay much attention to the broadcast. (R1381) That night, Appellant went to his sister's house and had a keg party with his two sisters and the Richardson brothers. (R1382) They barbecued, and made a huge bonfire in the back yard. (R1382) Everybody spent the night at Maureen Hannon's house because they were drunk. (R1382)

The next morning, Appellant learned about Snider and Carter having been killed. (R1382-1383) He called Toni Acker at her mother's house in Indiana and they talked about the funeral. (R1383)

On January 24 when Appellant got home from work, there was a card from a Detective Cribb on his door. (1387-1388) Appellant tried several time to call him, but was unable to reach him. (R1388-1389) Appellant eventually made contact with Cribb on February 1. (R1390) Appellant shaved that day because he had a date that night. (R1390)

With regard to Keith Fernandez, Appellant testified that he told Fernandez that he did not feel as though the investigators were trying to find the person who really did this. (R1394) When Fernandez asked him if the weapons had been found, Appellant replied, "Not to my knowledge, but at this rate, they probably never will be." (R1394-1395) With regard to any statement about bloody prints, Appellant told Fernandez that according to Mozell

Linton's exact statement, they claimed that they had a fingerprint so clear that it was like they dipped it in blood and touched the door, but Appellant said that this was not true; there was no possible way that he could have had a bloody hand, because he was not there that night. (R1395-1396) With regard to any statement about blowing his alibi, Appellant had talked to his sister on the telephone about the fact that people at the slaughterhouse had been questioned about two women. (R1369) When his sister asked him, Appellant told her that the only two women that he knew of were Robin and Kamla, but that they were there the night before. (R1396) Appellant then said to his sister, "Apparently what they're trying to do is put Jim and all of us together, trying to look bad, trying to blow my alibi." (R1396)

Terrance Owen, a chemistry professor at the University of South Florida, did a series of experiments that led him to conclude that the substance found on the inside of the door to the victims' apartment, as well as the substance on the stairwell wall [that is, the two areas of the apartment where Appellant's fingerprints allegedly were found] was more consistent with blood from old meat than it was with fresh blood. (R1406-1423,1431-1432)

Paul Kilgore (who was the final defense witness) had known Appellant since October, 1990. (R1437) The composite drawing did not look like Appellant; he had never had hair or a beard that long. (R1438) Kilgore had known Appellant to take pork loins out of the refrigerator and take them to a friend's house. (R1438-1439)

Penalty Phase

The State rested without presenting any additional evidence at penalty phase. (R1594)

Appellant presented the testimony of three witnesses. (R1597-1600) Toni Acker testified that she did not believe that Appellant would do anything like that [that is, commit the murders], which she felt were drug-related because of the way the victims were killed. (R1598) Appellant had even partied with Snider and Carter, and Acker questioned why he would kill his own friends. (R1598) Appellant was a "good-time guy, carefree, liked to have fun." (R1598) He had even babysat for Acker's child. (R1598)

Barbara Hannon, Appellant's mother, testified that he was the youngest of their four children, and their only son. (R1598-1599) Appellant did not want his parents to testify because he knew how badly they were hurting. (R1599) Appellant had never hurt anybody in his whole life, and could not even hurt an animal. (R1599) He had always taken care of everybody else, and could not hurt anybody. (1599) Mrs. Hannon asked the jury not to take away Appellant's life, so that they would have a chance to prove that he never did anything like this; he couldn't. (R1599)

Appellant's father testified that he had always been a "teddy bear," never a violent person. (R1600) Appellant had always been aware of his size, and that made him step back and think and never try to harm anybody. (R1600) Appellant said he was innocent, and Mr. Hannon believed that he was, and thought he ought to be given a chance to prove it. (R1600)

SUMMARY OF THE ARGUMENT

The trial court should not have excused prospective jurors Ling and Troxler for cause. Their answers during voir dire did not show that they were irrevocably committed to vote against the death penalty in all circumstances. Nor did the questioning establish that they could not follow the law, or that their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. The State failed to carry its burden to show that Troxler and Ling were excludable for cause.

The court below erred in permitting the State to question its witness, Toni Acker, regarding whether she had spoken with her brother about the possibility that Appellant might have been involved in the instant homicides, and exacerbated the problem by allowing the State to impeach Acker's negative response through the testimony of Detective Mozell Linton. The State invaded the province of the jury by adducing testimony that Acker had held an opinion on the ultimate issue in the case, Appellant's guilt or innocence, that was adverse to Appellant.

The lower court should not have permitted the State to engage in prosecutorial overkill by presenting cumulative evidence of an inflammatory nature. The bloody shorts and shirt of stabbing victim Brandon Snider and the testimony of blood splatter expert Judith Bunker had no relevance and should not have been admitted. If this evidence had any marginal probative value, it was far outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence.

The especially heinous, atrocious or curel aggravating circumstance is unconstitutionally vague and, as applied, does not genuinely limit the class of persons eligible for the death penalty. This aggravator has not been interpreted in a rational and consistent manner by the Court, and so sentencing judges are provided with inadequate guidance to enable them to separate the murders which qualify as especially heinous, atrocious or cruel from those which do not.

The trial court's instruction to Appellant's jury at penalty phase that they could consider in aggravation that the crime for which Appellant was to be sentenced was especially wicked, evil, atrocious or cruel did not provide the jury with sufficient guidance to pass constitutional muster. As a result, the jury's penalty recommendations are tainted, and Appellant must be given a new penalty phase before a new jury impaneled for that purpose.

The court below should not have found that the homicides of Brandon Snider and Robbie Carter were especially wicked, evil, atrocious or cruel, nor should the court had instructed the jury on these aggravating circumstances. The evidence failed to support a finiding of HAC as to the simple shooting death of Carter. This aggravator was not supported by the fact that Carter was shot six times, nor by the fact that he may have "seen it coming" for a brief period before he was shot. Any suffering Carter may have endured did not last long; he expired shortly after the shooting. Furthermore, the court gave Appellant's jury instructions on but one set of aggravating circumstances to cover both homicides, and

so the jury may have improperly attributed HAC to both killings, despite the lack of evidentiary support therefor.

The lower court should not have instructed Appellant's jury on the aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, nor should the court have found this aggravator to exist as to the Robbie Carter killing, as it was not supported by the evidence. The Court has repeatedly stated that the fact that the victim and the defendant knew each other is not enough to justify a finding of this factor. That Appellant may have told a cellmate after Appellant was arrested that the cellmate should not have left any witnesses was basically irrelevant, and provided scant additional support for this aggravator.

The trial court should not have instructed Appellant's jury on the aggravating circumstance of previous conviciton of another capital felony, nor found and weighed this aggravator in the sentencing equation, when it was based solely upon Appellant's contemporaneous convictions for capital felonies. In enacting section 921.141(5)(b) of the Florida Statutes, the legislature never intended for a contemporaneous conviction to be sufficient to find this aggravating circumstance applicable.

The barebones sentencing order entered by the trial court is not sufficiently clear and specific to enable this Court to conduct a meaningful review of Appellant's sentences of death. The order is particularly lacking in its development of the facts, and contains little or not analysis. Because the court did not make the

statutorily required findings, Appellant's death sentences must be vacated in favor of life sentences.

Appellant's death sentences cannot stand where he was the only one of the three men who allegedly participated in the events at Cambridge Woods to be sentenced to the ultimate sanction. Ron Richardson testified against Appellant at his trial. In return, Richardson was permitted to plead to one count of accessory after the fact and receive a five year prison sentence, and he is now "on the street." Jim Acker, who initiated the instant killings, and who had not even been arrested at the time of Appellant's trial, was eventually charged with the murders and found guilty, but received two life sentences. The final disposition of Richardson's case and Acker's case occurred after Appellant was sentenced, and so neither Appellant's jury nor the court had the benefit of this information in making the sentencing decisions. However, in the exercise of its review function, this Court can and must take into consideration what happened to Acker and Richardson, and must conclude that the only way for equal justice to prevail is for Patrick Hannon to be taken off of death row.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS LING AND TROXLER FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

During voir dire examination at Appellant's trial, the prosecutor was asking the prospective jurors about their views on the death penalty. His preliminary questioning of Mr. Ling and Ms. Troxler in this regard went as follows (R47-50)

> Like other crimes in the State of Florida, if Mr. Hannon is convicted of first degree murder, the jury then deliberates and makes a recommendation by majority vote as to the sentence. You all understand that?
>
> (Prospective jurors indicating affirmatively)
>
> MR. LEWIS [prosecutor]: That's important that you distinguish between what we call the guilt phase -- we'll refer to it as guilt phase throughout the trial; that's the phase in which the jury determines if, in fact, the defendant is guilty, and if he's guilty what crime he's guilty of. That's the guilt phase. And the penalty phase which only comes about if the defendant's convicted of first degree murder.
>
> Let me address these people here. Did any of you folks right here in front of me have any personal feelings, religious feelings that would preclude you from recommending the imposition of the death penalty? Just flat would keep you from doing it?
>
> MR. LING: I don't know. I don't know. I'm not opposed to it, but I've never been put in a position to do that. I don't know how I would feel at the time.

MR. LEWIS: I guess it's fair to say that your outlook changes when you're sitting in one of these chairs as opposed to--

MR. LING: Reading the newspaper.

MR. LEWIS: --talking around the break area at work, or sitting on a bar stool talking about criminals, right?

MR. LING: Yes.

MR. LEWIS: Other than this gentleman here--it's Mr. Ling?

MR. LING: Yes.

MR. LEWIS: Other than this gentleman here, you have no religious or personal feelings that would preclude you from recommending the imposition of the death penalty?

The same question for you folks out here: Any of you have any personal, religious, other types of feelings that would just automatically preclude you from recommending the imposition of the death penalty? Nobody? Okay.

Mrs. Troxler.

MS. TROXLER: (Indicating affirmatively)

MR. LEWIS: Your husband, I think. recently defected from the Tampa newspaper and now works in St. Petersburg. Is that accurate?

MS. TROXLER: Yes.

MR. LEWIS: Do you have any strong feelings for or against the death penalty?

MS. TROXLER: If I had to--I do have feelings about it. I contemplate whether I think that there should be a death penalty or not, or if someone should be sentenced to death or not, but I think that I could do so with an open mind.

MR. LEWIS: And, in an appropriate case--this is a different question--in an appropriate case, do you think you could recommend, Ms. Troxler, the death penalty? Let me say, you don't have an idea of what an appropriate

case is about. That's something you'll learn about from the penalty phase. Without going into detail, the Court will give you possibly some aggravating circumstances, some mitigating circumstances, and if you find there's aggravating circumstances proven beyond a reasonable doubt and you deal with the mitigating circumstances, weigh them and make a decision. You don't know yet if this is an appropriate case, but in an appropriate case, do you think you could recommend the imposition of a death penalty?

MS. TROXLER: No.

MR. LEWIS: You think you couldn't do it?

MS. TROXLER: No.

MR. LEWIS: You're pretty sure?

MS. TROXLER: Yeah.

MR. LEWIS: No matter what the facts are?

MS. TROXLER: I would say that no matter what the fact are, I think I would have to understand the facts in order to make that decision, but it would be difficult. I would say not knowing the facts of the case that I would really have a hard time imposing the death penalty.

MR. LEWIS: Now, do you understand that before you would be able to make that recommendation, you would have heard the facts in the case?

MS. TROXLER: Yes.

MR. LEWIS: Then you would have had to have been one of the unanimous jurors who found him guilty of first degree murder; you understand me?

MS. TROXLER: Uh-huh.

MR. LEWIS: Then after that, we would have the penalty phase. In the penalty phase, you may hear no more evidence than you've already heard. You might hear different evidence. We don't know. But where you sit now, you could

not recommend the imposition of the death penalty, could you?

MS. TROXLER: I don't have a religious conviction, but personally I don't think I could.

The prosecutor returned shortly to the subject of the death penalty, and had the following exchange with Ling (R52):

MR. LEWIS: Let's go back to my original question I asked these folks out here. In an appropriate case, and keeping in mind that we don't know yet what an appropriate case is, but in an appropriate case, could you recommend the imposition of the death penalty to the Court?

MR. LING: Well, about the only way I could answer your question is maybe.

MR. LEWIS: Is it fair to say that you're unsure?

MR. LING: Yes.

Later, the prosecutor asked the prospective jurors whether, if they had already heard the facts and thought that this was an appropriate case, they could recommend to the court the imposition of the death penalty. (R54) Ling responded that he was "still unsure." (R55) Troxler answered that she did not know what an appropriate case would be. (R56) She agreed with the prosecutor that it was fair to say that she could not think of one that would be appropriate. (R56)

Thereafter, when the court and counsel were discussing challenges to the prospective jurors, the following exchanges occurred with regard to Ling and Troxler (R178-179,184):

What says the State to the first twelve jurors in the jury box becoming the jury in the case?

MR. LEWIS: I'm a little concerned about Mr. Ling.

THE COURT: Fine. Does State and Defense stipulate the Court can excuse Mr. Ling?

MR. EPISCOPO [defense counsel]: No.

THE COURT: Fine. He says he can be fair.

MR. LEWIS: Said he could be fair, had some difficulty with the death penalty, as you may recall, with the questions about that. And my question to him, even after having to go farther than you normally have to go, assume it's an appropriate case, could you recommend the imposition of the death penalty, he was still hesitant, said maybe, didn't know. Not as definite as Mrs. Troxler. He said no, but--

THE COURT: So, you challenge Mr. Ling because he did not unequivocably [sic] say under appropriate circumstances, he could recommend the death penalty?

MR. LEWIS: If he was even close to that, I wouldn't challenge him for cause. He wasn't even close to that.

THE COURT: You agree that's what he did say: He wasn't definite?

MR. ESPICOPO: Not really. I would say he wasn't going to prejudge the evidence. I think he was willing to listen to the evidence before he reached the decision.

THE COURT: My recollection is that he did not say that he could, under the appropriate circumstances, recommend the death penalty and he vacillated. And the case law is clear that the State is entitled to challenge any juror who answers with reference to the death penalty in the manner that Mr. Ling answered, is subject to a challenge for cause.

* * *

THE COURT: Juror 27, Amy Troxler, becomes Juror 9.

> MR. LEWIS: We would move to have her removed for cause. She indicated that she could not impose or recommend the imposition of the death penalty. She was pretty strong about that.
>
> MR. EPISCOPO: I don't agree with that.
>
> THE COURT: You don't agree that's what she said?
>
> MR. EPISCOPO: No, I think she could consider the evidence before she would render an opinion.
>
> THE COURT: Denied. I mean, the challenge for cause is granted. The Court distinctly remembers that she unequivocably [sic] said that she may not be able to recommend the death penalty under any circumstances.

Unless a venireman is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances of the case, he cannot be excluded for cause. Johnson v. State, 17 Fla. L. Weekly S 603, 604 (Fla. Oct. 1, 1992); Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976).

The exclusion from a capital jury of any juror who is qualified to serve requires that the sentence of death be vacated. Gray v. Mississippi, 481 U.S. 648, 107 S. Ct 2045, 95 L. Ed. 2d 622 (1987); Davis v. Georgia. In Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), the United States Supreme Court held that the Sixth Amendment right to an impartial jury and Fourteenth Amendment due process are violated when all jurors opposed to capital punishment are struck for cause from a capital jury. As refined in Adams v. Texas, 448 U.S. 38, 100 S.

Ct. 2521, 65 L. Ed. 2d 581 (1980), the applicable proposition of law is:

> a juror may not be challenged for cause based upon his views about capital punishment unless these views could prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

448 U.S. at 45. Accord Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); Foster v. State, 17 Fla. L. Weekly S 658 (Fla. Oct. 22, 1992).

As Justice Rehnquist has explained:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Gray v. Mississippi, 481 U.S. at 658 (1987), quoting from Lockhart v. McCree, 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The burden of proof that a prospective juror is excludable for lack of impartiality rests with the party seeking exclusion. Wainwright v. Witt, 469 U.S. 412 at 423 (1985).

The voir dire answers given by prospective jurors Ling and Troxler did not demonstrate that they were disqualified to served in accordance with the principles discussed above. Troxler initially indicated that she could consider the death penalty "with an open mind," (R48-49), but then equivocated and stated that she did not think that she could recommend death or, at least, that it

would be "difficult" and that she "would really have a hard time imposing the death penalty." (R49-50) Her answers did not show that she could not follow the law as it was given to her by the court, and she was never specifically asked if she could do so. Her response that she "would really have a hard time imposing the death penalty" suggests that Troxler did not understand the advisory nature of the jury's penalty recommendation, and this misunderstanding of her role may have been the cause of her hesitancy to vote for death.

The theme that ran throughout Ling's voir dire was that he was simply uncertain whether he could recommend a sentence of death. At no time did he say that he was irrevocably committed to vote against death regardless of the facts, nor did he indicate that he could not abide by the judge's instructions on the law.

It is instructive to compare the voir dire conducted in the instant case with the voir dire in Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990). There the trial judge asked a general screening question of prospective jurors regarding scruples against the death penalty. This Court agreed that the initial question "was not adequate by itself" to disqualify potential jurors. 570 So. 2d at 915. However, no reversible error was committed because follow-up questions were asked of all jurors who indicated opposition to the death penalty. No juror was excused unless he or she indicated unequivocally that he or she could not follow the law. Here, no questioning of Ling or Troxler occurred that showed that either one of them could not follow the law. And in the examina-

tion that did take place, neither prospective juror indicated that his or her views on capital punishment would adversely affect his or her ability to serve on Appellant's jury.

The trial court's exclusion of Ling and Troxler was improper. Appellant's sentences of death must therefore be vacated because they were imposed in violation of his Sixth and Fourteenth Amendment rights to an impartial jury and due process of law.

ISSUE II

THE STATE WAS IMPROPERLY PERMITTED TO INVADE THE PROVINCE OF THE JURY ON THE ULTIMATE ISSUE IN THIS CASE BY SUGGESTING THAT STATE WITNESS TONI ACKER BELIEVED THAT APPELLANT MIGHT HAVE BEEN INVOLVED IN THE INSTANT HOMICIDES.

Toni Acker, who initially testified at Appellant's trial for the State, knew both victim Brandon Snider, and those accused of his killing. (R741-742,744-745) She testified concerning an incident in early 1991, when Snider, with whom Acker had been romantically involved, apparently burglarized her home and shot it up. (R742-746)

Upon cross-examination by defense counsel, Acker testified that the composite prepared by Detective Roslyn Kroll did not look like Appellant, and that he never had a beard as long as the one shown in the composite. (R748-749) On redirect, Acker denied telling Detective Mozell Linton that the composite resembled or looked like Appellant. (R759) The prosecutor also asked Acker whether she told Linton during the interview that she (Acker) had contacted her brother, Jim Acker, with reference to Appellant being involved in the murders, to which Acker responded, "No, I did not." (R763) Defense counsel objected and moved for a mistrial, stating that the prosecutor had blurted out something that was highly prejudicial. (R763-766) The court denied the motion for mistrial, but stated that he might revisit the matter if the State failed to call Detective Linton to impeach Acker. (R766) The prosecutor then asked

Acker the following questions and received the following responses (R766):

> Q. After you learned about the murder of Mr. Snider and Mr. Carter, did you have occasion to ask your brother, Jim Acker, about the possibility of Hannon's involvement?
>
> A. No, I did not.
>
> Q. At that interview that we've already talked about in Anderson, Indiana on January 16th, beginning at 9:40, did you tell Detective Mozell Linton that you had asked your brother Jim about Hannon possibly being involved?
>
> A. No, I did not.
>
> MR. LEWIS: I don't have any other questions.

The court below erred in permitting the State to pursue this line of questioning with Toni Acker. Acker obviously had no personal knowledge, no concrete information regarding who committed the instant crimes, and the fact that she might have believed, for some undisclosed reason, that Appellant could have been involved in the killings of Snider and Carter clearly had no relevance. For the State to have raised the suggestion that Acker thought Appellant was involved was highly prejudicial; it must have led the jurors to speculate as to whether Acker had some sinister information that was being withheld from them about Appellant's past or his character that led Acker to suspect that Appellant might have committed these crimes. [Compare this situation with cases which condemn testimony intimating that the police have received evidence of guilt of the accused from non-testifying witnesses, such as Postell v. State, 398 So. 2d 851 (Fla. 3d DCA 1981), Molina v.

State, 406 So. 2d 57 (Fla. 3d DCA 1981), Rolle v. State, 416 So. 2d 51 (Fla. 4th DCA 1982), and Fulmore v. State, 483 So. 2d 765 (Fla. 4th DCA 1986), and cases in which the prosecutor improperly implied that he had additional evidence of guilt which was not being presented in court, such as Williamson v. State, 459 So. 2d 1125 (Fla. 3d DCA 1984), Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975), Richardson v. State, 335 So 2d 835 (Fla. 4th DCA 1976), and Libertucci v. State, 395 So. 2d 1223 (Fla. 3d DCA 1981).]

Had the State stopped at this point, the prejudice might have been minimized, in light of the fact that Toni Acker denied speaking with her brother about the possibility of Appellant's involvement, and denied telling Detective Linton that she had had such a conversation, but the State was not content to let the matter rest. In accordance with the trial court's insistence, the prosecutor thereafter sought to impeach his own witness by inconsistent statements[8] when he asked Detective Linton the following questions on direct examination and received the following answers, over objections by Appellant's counsel (R964-970):

> Q. Detective Linton, when you showed Toni Acker the composite photograph, what did she say about it?
>
> A. She said after looking at it, she thought it looked like a person known to her as Patrick Hannon that lived in Tampa.

---

[8] Under the evidence code as formerly written, the party calling the witness could not impeach that witness. § 90.608(1), Fla. Stat. (1989). However, the current incarnation of the evidence code permits attacks on the credibility of a witness by "[a]ny party, including the party calling the witness[.]"§ 90.608, Fla. Stat. (1991).

Q. And what did she say, if anything, about a beard and a mustache?

A. She said he fit the physical description of being a big man, that he had long dark hair and a full beard and mustache.

Q. Did she make any statement about having asked her brother, Jim, about Hannon possibly being involved.

A. Yes.

Q. And what did she say?

A. She told me that she had had a conversation with her brother over the phone, that she had called down to Tampa after thinking about this case and asked her brother, Jim Acker, if he thought Patrick Hannon had been involved in killing Brandon and Robbie.

Now the jury had before it not merely the implication, but specific testimony indicating that Toni Acker had expressed the view that Appellant might be guilty as charged. It is inadmissible for a witness to invade the province of the jury by offering an opinion as to the ultimate issue in a criminal case, the guilt or innocence of the accused. Brockington v. State, 600 So. 2d 29 (Fla. 2d DCA 1992); Spradley v. State, 442 So. 2d 1039 (Fla. 2d DCA 1983); Karley v. State, 324 So. 2d 662 (Fla. 4th DCA 1975); Gibbs v. State, 193 So. 2d 460 (Fla. 2d DCA 1967). See also, Capehart v. State, 583 So. 2d 1009 (Fla. 1991) (improper for prosecutor to ask detective whether he had any reason to believe that defendant's statement to another officer was the truth, as this invaded the province of the jury to assess the evidence). And yet this is exactly what the State's witnesses did at Appellant's trial. The error cannot be considered harmless, as Appellant's guilt was

vigorously contested at trial, and the defense put on a substantial case of its own, which included Appellant's testimony denying any part in the instant homicides. (R1221-1449) Under these circumstances, the State's improper examination of Toni Acker, followed by improper testimony from Detective Linton, deprived Appellant of his right to a fair trial by jury and violated principles of due process of law, in contravention of the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 9 and 16 of the Constitution of the State of Florida. Appellant must receive a new trial.

ISSUE III

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE AT APPELLANT'S TRIAL PHYSICAL EVIDENCE AND TESTIMONY THAT WAS IRRELEVANT, PREJUDICIAL, AND CUMULATIVE.

At most trials of capital cases, the State puts into evidence gory photographs of the victim(s), and this Court has generally upheld the admission of this type of evidence. See, for example, Bush v. State, 461 So. 2d 936 (Fla. 1984); Straight v. State, 397 So. 2d 903 (Fla. 1981); Williams v. State, 228 So. 2d 377 (Fla. 1969). However, this Court has also recognized that this type of evidence must be kept within some reasonable bounds, and its admissibility is not without limits. See, for example, Czubak v. State, 570 So. 2d 925 (Fla. 1990); Young v. State, 234 So. 2d 341 (Fla. 1970). At the trial of Appellant's cause, the State put into evidence the usual gruesome pictures of the victims, the most egregious of which were objected to (R436-438,503-504,507,1883, 1923-1928,1945-1950), and put into evidence a large number of pictures of the crime scene showing various areas of blood staining. (R698-700,701-717,1847-1850,1852-1853,1859-1860,1862-1863,1865-1922,1929-1936,1943) However, the State was not content to stop there. The prosecution also put into evidence, over objection, Brandon Snider's bloody shorts (R456-458) and bloody shirt (R1122-1123), the clothing he was wearing when he died. But the State went even further and presented the testimony of a witness named Judith Bunker, a forensic consultant in the field of blood stain pattern analysis and crime scene reconstruction. (R1076-1127) Before

Bunker testified, defense counsel objected that what she had to say would be irrelevant and inflammatory. (R1073) The court "denied" the relevancy objection (R1073), and reserved ruling on the objection that the testimony would be inflammatory (R1073-1074), but ultimately did not rule on this second ground for the objection.

The basis test for evidentiary admissibility is relevance. § 90.402, Fla. Stat. (1991); Straight; Williams. Brandon Snider's bloody clothing and Judith Bunker's testimony failed to pass this test; the evidence did not "tend to prove or disprove a material fact," which is the definition of relevant evidence, § 90.401, Fla. Stat. (1991). If the State had some legitimate need to apprise the jury of the amount and/or location of blood on Snider's clothing (although it is difficult to imagine what that need might have been), this was clearly and graphically depicted in photographs which were admitted. (R1923-1928) There was no need to further assault the jurors' sensibilities by inflaming them with Snider's actual bloody shirt and shorts; the evidence was cumulative.

Judith Bunker's testimony consisted essentially of a short course in how to analyze bloodstains, and testimony regarding whether blood was cast off or merely dropped down, the direction of various blood flows, etc., complete with slide show. Like the bloody clothing, this evidence added nothing to the State's case. The amount and location of blood present in the apartment was evident from the pictures that were admitted, and Bunker's testimony did nothing to properly aid the jury in its resolution of this case.

Even relevant evidence cannot be admitted if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. § 90.403, Fla. Stat. (1991). Certainly the type of overkill in which the State indulged at Appellant's trial involved the needless presentation of cumulative evidence, and the inflammatory nature of the evidence could not have helped but unfairly prejudice Appellant's jury against him. Of the evidence presented it may be said that

> the gruesomeness of the portrayal [was] so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence.

Leach v. State, 132 So. 2d 329, 332 (Fla. 1961) The evidence served "only to create passion," and should have been rejected. Swan v. State, 332 So. 2d 485, 487 (Fla. 1975). Because it was not, Appellant must be granted a new trial, free from the taint of this improper evidence. Amends, V, VI, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

ISSUE IV

APPELLANT'S DEATH SENTENCES VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Appellant's co-defendant, Ronald I. Richardson, filed at least two motions ("Motion to Dismiss" and "Motion to Vacate the Death Penalty") challenging the constitutionality of Florida's death penalty statute on grounds that included vagueness and arbitrary and capricious application. (R2003-2011,2038-2042) Appellant, through his counsel, joined in these motions. (R1655,2066) The trial court denied both motions on June 14, 1991 (R2003,2072,2080), and ultimately found both of the instant homicides to qualify as "especially wicked, evil, atrocious or cruel" pursuant to section 921.141(5)(h), Florida Statutes (1991). (R1806,1808-1809)

In Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), the United States Supreme Court upheld Florida's death penalty statute against an Eighth Amendment challenge, indicating that the required consideration of specific aggravating and mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could

> have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 195 n. 46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235, 249-250 (1983) (footnote omitted). As it has been applied, however, Florida's especially heinous, atrocious or cruel aggravating factor has not passed constitutional muster under the above-stated principles, as it has not genuinely limited the class of persons eligible for the ultimate penalty. This fact is evidenced by the inconsistent manner in which this Court has applied the aggravator in question, resulting in a lack of guidance to judges who are called upon to consider its application in specific factual settings. The standard of review has vacillated. For instance, in Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's," 578 So.2d at 692, whereas in Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), the analysis concerned the perpetrator's intent: "The intent and method employed by the wrong-doers is what needs to be examined."

As this Court stated in Smalley v. State, 546 So. 2d 720 (Fla. 1989), the Supreme Court of the United States upheld the facial

validity of the HAC factor in Proffitt against a vagueness challenge because of the narrowing construction this Court set forth in State v. Dixon, 283 So. 2d 1 (Fla. 1973). However, in Sochor v. Florida, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 326 (1992), the Supreme Court strongly suggested that this Court has not adhered to the limitations purportedly imposed upon HAC by the definitions of "heinous," "atrocious" and "cruel" enunciated in Dixon:

> Sochor contends. . .that the State Supreme Court's post-Proffitt [v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976)] cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon language we approved in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above [in which this court gave its interpretation of the terms "heinous," "atrocious," and "cruel," and stated what types of capital crimes were intended to be included within these definitions], perhaps thinking that Proffitt approved it all. [Citations omitted.]

119 L. Ed. 2d at 339 [emphasis supplied].

The Supreme Court has also indicated in post-Proffitt cases that even definitions such as those employed in Dixon are not sufficiently specific to enable an aggravator like HAC to withstand a vagueness challenge. Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

Deaths by stabbing provide but one of many specific examples which could be cited of the Court's failure to apply the section

921.141(5)(h) aggravating circumstance in a rational and consistent manner. In cases such as Nibert v. State, 574 So. 2d 1059 (Fla. 1990), Mason v. State, 438 So. 2d 374 (Fla. 1983), and Morgan v. State, 415 So. 2d 6 (Fla. 1982), the Court has approved findings of especially heinous, atrocious, or cruel where the deaths resulted from stabbings. In Wilson v. State, 436 So. 2d 908 (Fla. 1983), however, a killing that resulted from a single stab wound to the chest was held not to be especially heinous, atrocious or cruel. In Demps v. State, 395 So. 2d 501 (Fla. 1981) the victim was held down on his prison bed and knifed. Even though he was apparently stabbed more than once (the opinion refers to "stab wounds" (plural) 395 So. 2d at 503), and lingered long enough to be taken to three hospitals before he expired, this Court nevertheless found the killing not to be "so `conscienceless or pitiless' and thus not `apart from the norm of capital felonies' as to render it `especially heinous, atrocious, or cruel' [citations omitted]." 395 So. 2d at 506. See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So. 2d 200 (Fla. 1983) simple stabbing death without more not especially cruel, atrocious, and heinous). [For other examples of how various aggravating circumstances have been applied inconsistently, please see MELLO, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 (1983-84).] The result of the illogical manner in which the section 921.141(5)(h) aggravator has been applied is that sentencing courts have no legitimate

guidelines for ascertaining whether it applies. Any killing may qualify, and so the class of death-eligible cases had not been truly limited.

The inconsistent rulings by this Court applying or rejecting the HAC factor under the same or substantially similar factual scenarios show that the factor remains prone to arbitrary and capricious application. These infirmities render the HAC circumstance violative of the Eighth and Fourteenth Amendments. Appellant's sentences of death imposed in reliance on this unconstitutional factor must be vacated.

ISSUE V

APPELLANT'S SENTENCES OF DEATH CANNOT STAND, BECAUSE THEY ARE PREDICATED, AT LEAST IN PART, ON TAINTED JURY RECOMMENDATIONS, AS APPELLANT'S JURY WAS GIVEN AN UNCONSTITUTIONALLY VAGUE INSTRUCTION ON THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

Appellant's trial counsel objected to the court below instructing the jury on the aggravating circumstance found in section 921.141(5)(h), Florida Statutes (R1605-1606), but the court nonetheless instructed the jury that they could consider the following factor in aggravation (if it had been established by the evidence) (R1619-1620): "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel."

For years, this Court has rejected attacks on Florida's former standard jury instruction dealing with this particular aggravating circumstance. See, e.g., Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989). This Court has repeatedly held Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), to be inapplicable to Florida's capital sentencing scheme, since the jury is not "the sentencer" for Eighth Amendment purposes. Smalley v. State, 546 So. 2d at 722.

The United States Supreme Court has recently rejected this reasoning. In Espinosa v. Florida, 505 U.S. 505 ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the United States Supreme Court found a jury instruction identical to the one given to Appellant's jury to be unconstitutionally vague. The instruction left the jury

with insufficient guidance when to find the existence of the aggravating factor. The Court pointed out that they have held instructions more specific and elaborate than the one given in Espinosa's case unconstitutionally vague. See e.g., Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).[9]

The United States Supreme Court rejected this Court's reasoning that the aforementioned cases were inapplicable to Florida's death-sentencing scheme. Citing the great deference that a Florida trial court is required to pay to a jury's sentencing recommendation,[10] the United States Supreme Court held that even the indirect weighing of an invalid aggravating factor violates the Eighth Amendment. The Court held that, if a weighing state decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances. Espinosa v. Florida, 120 L. Ed. 2d at 859 (1992).

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[9] At least implicitly recognizing the infirmity of the former standard jury instruction that was read to Appellant's jury, this Court has approved an amendment to the standard instruction so that the new charge defines the aggravator in question in terms of the statutory phrase of "especially heinous, atrocious or cruel," rather than "especially wicked, evil, atrocious or cruel," and includes the definitions of "heinous," "atrocious" and "cruel" set forth in State v. Dixon, 283 So. 2d 1 (Fla. 1973). In re Standard Jury Instructions Criminal Cases--No. 90-1, 579 So. 2d 75 (Fla. 1990). However, even this instruction, while more specific than the former instruction, does not provide sufficient guidance to juries to pass constitutional muster.

[10] Tedder v. State, 322 So. 2d 908 (Fla. 1975).

The Supreme Court emphasized the importance of suitable jury instructions in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. [Footnote and citation omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

49 L. Ed. 2d at 885-886. Appellant's jury was not "carefully and adequately guided" in its deliberations; the inadequate jury instruction on HAC tainted the recommendations and rendered them unreliable. Appellant's death sentences, predicated in part on the unreliable recommendations, cannot stand, as they were imposed in violation of the requirements of due process of law, and subject Appellant to cruel and unusual punishment. Amends. VIII and XIV, U.S. Const.; Art. I, Sections 9 and 17, Fla. Const. He must be granted a new penalty phase, before a new jury impaneled for that purpose.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING IN AGGRAVATION THAT THE INSTANT HOMICIDES WERE ESPECIALLY WICKED, EVIL, ATROCIOUS OR CRUEL.

As discussed in Issues IV and V herein, Appellant's jury should not have been instructed on the aggravator of especially wicked, evil, atrocious or cruel at penalty phase, because this factor is vague and has been applied arbitrarily and capriciously, and the standard charge given to the jury was not sufficiently specific to guide and channel the jury's discretion. (With regard to the Brandon Snider homicide, see particularly the discussion in Issue IV regarding the inconsistent manner in which this Court has treated homicides by stabbing.)

Furthermore, the evidence presented below did not establish that the homicide of Robbie Carter qualified for this aggravating circumstance. The court below made the following finding of the section 921.141(5)(h) aggravating circumstance as it applied to the killing of Carter (R1808-1809):

> The capital felony was especially wicked, evil, atrocious or cruel as evidenced by the defendant shooting at the victim after he witnessed his roommate's murder and the defendant then pursuing the victim into an upstairs bedroom where the defendant shot the victim six times as he lay helpless and defenseless under a bed.

In Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), this Court wrote as follows regarding the especially heinous, atrocious or cruel aggravating circumstance as it relates to deaths by shooting:

> Early in the history of the capital felony sentencing law, this Court provided an interpretation of this statutory factor. "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crimes apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1,9 (Fla. 1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Under this standard, a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel. Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert.denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); Tedder v. State, 322 So.2d 908 (Fla. 1975).

In many other cases in addition to Lewis, this Court has found shootings, even when committed execution-style, not to qualify for the heinous, atrocious, or cruel aggravating circumstance. E.g., Santos v. State, 591 So. 2d 160 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991); Parker v. State, 458 So. 2d 750 (Fla. 1984); Clark v. State, 443 So. 2d 973 (Fla. 1983); Maggard v. State, 399 So. 2d 973 (Fla. 1981); Armstrong v. State, 399 So. 2d 953 (Fla. 1981); Kampff v. State, 371 So. 2d 1007 (Fla. 1979); Burns v. State, 18 Fla. L. Weekly S 35 (Fla. Dec. 24, 1992); Clark v. State, 17 Fla. L. Weekly S 655 (Fla. Oct. 22, 1992); Maharaj v. State, 597 So. 2d 786 (Fla. 1992); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Porter v. State, 564 So. 2d 1060 (Fla. 1990); Jones v. State, 569 So. 2d 1234 (Fla. 1990).

In this case, there were no facts to set the shooting of Carter apart from the norm. The fact that he was shot six times does not render the homicide especially heinous, atrocious or cruel. In Blanco v. State, 452 So. 2d 520 (Fla. 1984), for example, this Court rejected HAC even though the victim had been shot seven times. And in Clark, this Court stated that "[t]he fact that it took more than one shot to kill this victim does not set this crime apart from the norm of capital felonies, and there is no indication that the crime was committed in such a manner as to cause unnecessary and prolonged suffering to the victim." 17 Fla. L. Weekly at S 655. The same is true in the instant case: there is no indication that those who went to the apartment at Cambridge Woods intended to cause Carter any unusual or sustained suffering.

Nor does the fact that Carter may have been aware for a short period of time that his death was likely convert this simple shooting into an especially wicked, evil, atrocious or cruel killing. The events in question apparently happened very quickly. Carter's shooting came soon after Brandon Snider was stabbed; there was no protracted ordeal involved. Several cases are instructive. In Burns the highway patrol trooper who was the victim knew that Burns had taken his gun. With his hand upraised, Trooper Young exhorted Burns not to shoot him, saying, "You can go," and, "You don't have to do this," but Burns shot and killed him. 18 Fla. L. Weekly at S 35. In Clark the killing was not HAC even though the victim "was probably conscious between the time the first shot was fired and the time he was killed by the second shot, and therefore

was probably aware of his impending death." 17 Fla. L. Weekly at S 655. Wright involved the killing of the defendant's girlfriend, with whom he had an on-again, off-again relationship. Wright entered the victim's house at night by knocking down the back door and the kitchen door and started shooting and cursing. The victim, struck by the bullets Wright fired, fell outside the house as she tried to flee. She died of bleeding caused by four gunshot wounds, three of which could have been fatal. While reversing on other grounds, this Court specifically found the especially heinous, atrocious or cruel aggravating circumstance not to be supported by the evidence beyond a reasonable doubt. In Santos the defendant and Irma had lived together and had a child together, Deidre. The couple had a history of domestic problems. Santos went to a place near Irma's parents' house, where Irma was staying. He saw Irma walking with Deidre and Irma's son from a previous marriage. Santos walked toward them at a fast pace. When Irma saw Santos coming, she screamed and began running with Deidre in her arms. Santos quickly grabbed her, spun her around, and fired three shots, killing Irma and Deidre. This Court invalidated the trial court's finding of especially heinous, atrocious or cruel, noting that this aggravator applies in torturous murders involving extreme and outrageous depravity. The killings happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain upon, or otherwise torture, the victims. These cases all indicate that a shooting death does not qualify for

the especially heinous, atrocious or cruel aggravator merely because the victim "saw it coming" shortly before he was killed.

The fact that Carter may have lived for a short time after he was shot likewise does not show that his death was especially heinous, atrocious or cruel. In Richardson, the victim was shot with a shotgun, but did not die instantaneously; death occurred only after enough blood seeped into her chest cavity to prevent her heart from beating, but this Court invalidated the lower court's finding of HAC. And in Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), another shooting case, the Court rejected HAC, noting that "[t]he fact that the victim lived for a couple of hours in undoubted pain and knew that he wasfacing [sic] imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies." Carter lived for, at most, a very few minutes after he was shot, according to the testimony of the deputy associate medical examiner, and was probably rendered unconscious immediately. (R501-503) Carter had expired by the time paramedics arrived, and they apparently got there not long after the shooting. (R430-431,435-436) Any suffering he endured clearly was of short duration, and there was no evidence to show that the perpetrators subjected him to any type of torture or abuse beyond what was necessary to effect his death.

One final point that deserves mention is that Appellant's jury was not instructed separately on the aggravators that might apply to the two homicides; they were given but one set of aggravators to cover both deaths. (R1619-1620) Thus there is the danger that the

jurors might have attributed one factor to both killings even though it was not supported by the evidence as to both. For example, the jury might have attributed the especially heinous, atrocious or cruel aggravator to both homicides, even if they felt that the evidence really only supported a finding of this factor as to Brandon Snider's death.

For the foregoing reasons, Appellant's death sentences, predicated in part on an invalid factor, cannot be allowed to stand without violating principles of due process of law, and subjecting Appellant to cruel and unusual punishment, in violation of Amendments Eight and Fourteen to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida.

ISSUE VII

THE TRIAL COURT ERRED IN INSTRUCTING APPELLANT'S JURY AT PENALTY PHASE ON, AND FINDING THE EXISTENCE OF, THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE OF ROBBIE CARTER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

During the penalty phase jury charge conference, counsel for Appellant objected to the court instructing the jury that they could consider in aggravation that the crime for which Appellant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. (R1604) Although the record reflects that the court sustained the objection (R1604), he nevertheless instructed Appellant's jury that they could consider this factor in aggravation. (R1619-1620)[11]

In his written "Findings in Support of Death Sentence Under Count Two," the court found the section 921.141(5)(e) aggravating factor applicable to the killing of Robbie Carter, as follows (R1808):

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest as evidenced by the fact that the defendant and the victim knew each other; the defendant murdered the victim for the dominant or sole purpose of eliminating him as an eyewitness to the murder of his roommate; and

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[11] It may be that the record is incorrect when it reflects that the trial court sustained Appellant's objection. Immediately thereafter, the court said, "Your record on appeal is protected[,]" which appears to show that the court was telling defense counsel that he had preserved his point for appeal by objecting, but that the court was overruling the objection, and was going to give the State's requested instruction on this aggravator over the defense objection. (R1604)

> the defendant told a cellmate that he "should have never left any witnesses" after the cellmate told the defendant he was in jail because someone had testified against him.

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Bates v. State, 465 So. 2d 490 (Fla. 1985); Riley v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). In fact, there must be proof beyond a reasonable doubt that the dominant or only motive for the killing was the elimination of a witness. Rogers v. State, 511 So. 2d 526 (Fla. 1987); Doyle v. State, 460 So. 2d 353 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Perry v. State, 522 So. 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Davis v. State, 604 So. 2d 794 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992). That proof was not forthcoming during Appellant's trial. The fact that Appellant and Robbie Carter were acquainted with one another was not enough to establish this factor. Davis; Geralds; Bruno v. State, 574 So. 2d 76 (Fla. 1991); see also, Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Perry; Floyd; Caruthers. The only other fact cited by the court in support of his conclusion that the defendant murdered Carter for the dominant or sole purpose of eliminating him as an eyewitness to the murder of Snider, namely, that Appellant supposedly told a cellmate that he should not have left any witnesses after the cellmate told Appellant that he was in jail because someone had testi-

fied against him,[12] was essentially irrelevant. This comment, made in response to a remark by the cellmate, indicated nothing about the motivation for the killing of Robbie Carter. As in Jackson v. State, 599 So. 2d 103 (Fla. 1992), there was no direct evidence of the motive for Carter's killing, and the circumstantial evidence was insufficient to prove that Carter was killed to eliminate him as a witness.

Troedel v. State, 462 So. 2d 392 (Fla. 1984) is particularly applicable to the instant case. This Court observed that the section 921.141(5)(e) aggravating circumstance "most clearly applies when the offender's primary purpose is some antecedent crime such as burglary, theft, robbery, sexual battery, etc., for which the criminal then kills in order to avoid arrest and prosecution." 462 So. 2d. at 398. In Troedel there was a question as to whether the defendant and another had gone to the victims' house in order to rob them, and that "the killers had the ancillary purpose, in murdering the victims, of avoiding arrest or effecting escape[,]" 462 So. 2d at 398, or whether they had murder in mind from the outset, with robbery as an afterthought. This Court held that the defendant was entitled to the ambiguity of the differing conclusions that could be drawn from the facts of that case. "So far as the evidence showed," in Troedel, "the primary purpose of appellant's going to the [victims'] home was to commit murder. [Citations omitted.]" This Court therefore disapproved the trial

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[12] The court was apparently referring in his findings to the testimony of Rodney Green, which appears in the record at pages 873-878.

court's finding of the avoid arrest aggravating factor. As in Troedel, one may surmise that the perpetrators went to the Snider/ Carter residence with the intention of killing them both. This conclusion is strongly suggested by the fact that the perpetrators apparently showed no hesitation or indecision when they arrived at the apartment, but immediately and quickly set about the task of dispatching both victims. It is further supported by the trial court's own findings, in which he found that the capital felonies were committed while Appellant was engaged in committing burglary, but did not specify what offense Appellant intended to commit in the victims' residence. (R1806,1808) The only possible offense intended could have been the instant homicides; there was no substantial evidence from which one could infer otherwise.

For these reasons, the aggravating circumstance of avoiding or preventing arrest must not be permitted to stand. As discussed in Issue VI herein, Appellant's jury was instructed on only one set of aggravating circumstances, and so may have improperly considered this aggravator applicable to both the Snider and Carter killings. Therefore, the invalidation of this factor should lead to the reversal of Appellant's death sentence not only for the Robbie Carter homicide, but for the Brandon Snider homicide as well. To do otherwise would deprive Appellant of the due process of law to which he is entitled, and subject him to cruel and unusual punishment. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9 and 17, Fla. Const. Because the jury was instructed on an aggravating circumstance that the evidence did not support, Appellant must be

afforded a new penalty phase before a new jury impaneled for that purpose. See Omelus v. State, 584 So. 2d 563 (Fla. 1991).

ISSUE VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING IN AGGRAVATION THAT APPELLANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY BASED UPON HIS CONTEMPORANEOUS CONVICTIONS FOR THE OTHER HOMICIDES.

Over defense objection (R1602-1603), the court below instructed Appellant's jury that one of the factors that they could consider in aggravation (if it had been established by the evidence) was that the defendant had been previously convicted of another capital offense. (R1619) The court further instructed Appellant's jury that the crime of murder in the first degree is a capital offense. (R1619)

In his written sentencing order as to the Brandon Snider homicide, the court found that Appellant was previously convicted of another capital felony by virtue of his conviction for killing Robert Carter, and as to the Robert Carter homicide, that Appellant was previously convicted of another capital felony by virtue of his conviction for killing Brandon Snider. (R1806,1808)

No evidence was presented to show that Appellant had previously been convicted of any other capital or violent felony apart from the two homicides in the instant case. It is illogical and fundamentally unfair to allow each contemporaneous murder conviction to be an aggravator of the other.

Appellant would first note that he had not been adjudicated guilty of the murder of Robert Carter at the time he was sentenced to death for the murder of Brandon Snider; the trial court first

adjudicated him guilty of the Snider homicide and sentenced him to death for that offense, and then adjudicated him guilty of the Carter homicide and sentenced him to death for that offense. (R1642)[13]

Moreover, in enacting the aggravating circumstance provided for in section 921.141(5)(b), Florida Statutes, the legislature never intended for the circumstance to be applied where a contemporaneously committed violent felony supplies the "previous conviction," and this aggravator should not have been considered in the sentencing weighing process in Appellant's case.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. 465, listed the following two relevant aggravating circumstances:

> (b) The defendant was previously convicted of another capital felony or a felony involving the use of threat of violence to the person.
>
> (c) At the time the capital felony was committed the defendant also committed another capital felony.

(Emphasis added) This language was derived directly from the Model Penal Code, Section 210.6(3)(b)(c). The Commentary to the Model Penal Code, from which the language of the Florida Statute was drawn, explains that the first aggravator quoted above was intended to be limited to offenses committed prior to the instant offenses;

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[13] But see McCrae v. State, 395 So. 2d 1145 (Fla. 1981) (valid guilty plea or jury verdict of guilty constitutes "conviction" for purposes of section 921.141(5)(b), Florida Statutes (1975); adjudication of guilt not necessary).

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggest two inferences supporting the escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

The second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous convictions;

> Paragraphs (c) and (d) (knowing creation of homicidal risk to many persons) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons.

When the Legislature subsequently eliminated paragraph (c) quoted above, it expressed its intention that the aggravator at issue only be applicable where the prior conviction was obtained in a prior case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This is a reasonable position since the legislature was focusing (a) on the issue of failed rehabilitation, i.e., the defendant was already given a second chance, and (b) the issue of propensity or future dangerousness. The interpretation of this aggravator which has allowed it application to cases involving more than one homicide does not address this historical concern and, in effect, becomes a multiple-offense aggravator rather than a failed rehabilitation/

propensity aggravator. In this regard, this Court's conclusion in King v. State, 390 So. 2d 315, 320 (Fla. 1990), that:

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance

for which this Court gave no authority, is contradicted by the above facts. Furthermore, his Court has placed a significant limitation upon its holding in King that contemporaneous convictions prior to sentencing can qualify for the aggravator in question. In Wasko v. State, 505 So. 2d 1314,1317-1318 (Fla. 1987), this Court adopted a new policy that if there is but one incident and one victim, then contemporaneous crimes cannot be used as a prior violent felony. Appellant submits that the Wasko decision does not go far enough. Contemporaneous convictions arising out of a single incident should not be permitted to be considered regard less of the number of victims. The rationale of Wasko seems to be that contemporaneous convictions should not be used if the incidents are not separated in time, but are rather a single incident; it makes no sense for this rationale to require only a single victim. "Prior" means "prior," not "different victims even though at the same time."

Also relevant to this discussion is State v. Barnes, 595 So. 2d 22 (Fla. 1992), in which this Court recently construed the habitual offender statute concerning predicate felony convictions which contained virtually identical language to that found in section 921.141(5)(b), Florida Statutes (1991). Section 921.141 (5)(b) provides for an aggravating circumstance if the defendant

"was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person [emphasis supplied]." The habitual offender statute discussed in Barnes, section 775.084(1)(a), Florida Statutes (Supp. 1988), provided for habitual offender treatment if, among other requirements, "The defendant has previously been convicted of two or more felonies in this state." This Court held in Barnes that the predicate felony convictions required for the habitual offender statute did not require sequential convictions. However, in Barnes, the convictions did arise from separate incidents and the holding did not remove the requirement that the predicate convictions arise from separate incidents. Justice Kogan, concurring specially wrote,

> I concur with the rationale and result reached by the majority, but only because this particular defendant's felonies arose from two separate incidents. Were this not the case, I would not concur. I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single incident, and I do not read the majority as so holding today. Under Florida's complex and overlapping criminal statutes, virtually any felony offense can give rise to multiple charges, depending only on the prosecutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is that the legislature intended, it simply would have enhance the penalties for all crimes rather than resorting to a "back-door" method of increasing prison sentences.

Barnes, 595 So. 2d at 32. Since the language used in the two statutes is virtually identical, the legislature must have intended previous conviction under Section 921.141(5)(b) to likewise arise from a separate criminal incident. Any other construction violates

the rule of lenity set forth in section 775.021(1), Florida Statutes (1991), as well as principles of due process of law, and subjects the defendant to unconstitutional cruel and unusual punishment. Amends. VIII and XIV, U. S. Const.; Art. I, §§ 9 and 17, Fla. Const.

The aggravating circumstance of previous conviction for a capital felony was improperly found and considered in sentencing Appellant to death. He asks this Court to reverse his sentence.

ISSUE IX

THE TRIAL COURT'S SENTENCING ORDER CONTAINS INSUFFICIENT FACTUAL BASIS AND ANALYSIS TO SUPPORT APPELLANT'S SENTENCES OF DEATH.

This Court has stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation in capital cases. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id. Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal v. State, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of death sentences, without which adequate, reasoned review is impossible. Unless the written findings are supported by specific facts, the Supreme Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating

circumstances. Id.; Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). Although the Court considered the sentencing order sufficient (but barely) in Rhodes, the Court cautioned that trial judges should use greater care in preparing their sentencing orders so that it is clear to the reviewing court just how the trial judge arrived at the decision to impose death over life. As the Court held in Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found."

The court below entered what amounts to a "barebones" order of just over four pages in length imposing two death sentences upon Appellant. The aggravating factors are supported by very cursory facts only, and there is very little analysis or application of the specific facts of the case, and no attempt to reconcile the many conflicts in the evidence presented at trial. The sparseness of the factual basis for the court's finding appears perhaps most starkly in his conclusion as to both homicides that they were committed during a burglary "as evidenced by the defendant and his accomplices having entered or remained in the victim's dwelling with intent to commit an offense therein against" Brandon Snider. (R1806,1808) This finding is merely a conclusion, with no facts cited in support thereof. The court does not even tell us what offense Appellant and the others intended to commit.[14]

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[14] The indictment herein did not charge Appellant or Ron Richardson with burglary of the Snider/Carter apartment. (R1683-1685)

Furthermore, the order provides no clue as to how the court reached his conclusion on each count that the aggravating circumstances outweighed the mitigating circumstances to such an extent that Appellant deserved the death penalty. There is no indication of what standard the court used in weighing the factors, and no analysis regarding the relative merits of each aggravator and mitigator, but merely the bare conclusion that aggravation outweighed mitigation.

In accordance with the principles discussed above, to uphold Appellant's death sentences on the basis of this order would deny him his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Because the court below failed to make sufficiently specific findings of fact as required by section 921.141(3), Florida Statutes (1991), Appellant's death sentences must be vacated in favor of sentences of life imprisonment. Van Royal.

ISSUE X

APPELLANT'S SENTENCES OF DEATH DENY HIM EQUAL JUSTICE UNDER THE LAW, AS NEITHER OF THE OTHER PARTICIPANTS IN THE EVENTS AT THE CAMBRIDGE WOODS APARTMENTS WAS SENTENCED TO DEATH.

In Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), this Court addressed the principal of equal punishment for equal culpability in capital cases as follows:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

In Slater, the defendant was the accomplice; the triggerman had entered a plea of nolo contendere to the charge of first degree murder and, in exchange, had received a life sentence. This Court reduced the sentence of death to life imprisonment. 316 So. 2d at 543.

In Craig v. State, 510 So. 2d 857, 870 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S. Ct. 732; 98 L. Ed. 2d 680 (1988), the Court explained:

> the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

There, because the defendant was the planner and the instigator of the murders, rather than the accomplice, whose help had been solicited by the defendant, the disparate treatment afforded the

accomplice was not a factor that required the court to accord a life sentence.

Since Slater, this Court has, on numerous occasions, reversed death sentences where an equally culpable codefendant received lesser punishment. E.g, Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989); Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988); Cailler v. State, 523 So. 2d 158 (Fla. 1988); Du Boise v. State, 520 So. 2d 269, 266 (Fla. 1988); Brookings v. State, 495 So. 2d 135, 142-143 (Fla. 1986); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

The principles expressed in Slater and subsequent opinions of this Court are also consistent with the requirements of the United States Constitution. The Eighth and Fourteenth Amendments require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the roles played by his cohorts. See Enmund v. Florida,458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

In the instant case, Ron Richardson, Appellant's co-defendant, was able to avoid exposure to the death penalty for the two capital crimes with which he was charged by cutting a deal with the State in return for his testimony against Appellant. This deal called for Richardson to receive a five year prison sentence for a plea to one count of being an accessory after the fact. (R1150-1167,1192-1193) Richardson's self serving statements below naturally were calculated to make him appear less culpable than Appellant or Jim

Acker; he essentially portrayed himself as a bystander, a mere witness to the homicides perpetrated by the others. Of course, Richardson's guilty was never tested in the crucible of a jury trial, at which witnesses other than Ron Richardson could be called to testify. Furthermore, the trial court's sentencing order suggests that the court did not view Richardson's participation to constitute merely that of an accessory. In mitigation of Appellant's sentences, the court specifically found that Richardson was no longer facing murder charges even though "he also entered the dwelling of both victims with the intent to commit an offense against" the two victims. (R1807,1809) The court thus recognized that Richardson had murder in his heart when he accompanied the others to Cambridge Woods; murder could have been the only "offense" he "intended." [15]

Although the trial court and the jury knew of the bargain between the State and Ron Richardson, they not only did not have the benefit of hearing from witnesses who might have testified that Richardson's role was greater than what he claimed, they also did not have the benefit of knowing whether the deal ultimately went through. Although it does not appear of record, undersigned counsel has been informed by Appellant's trial counsel that Richardson did in fact receive his five year sentence and has now been released. Thus, approximately a year and a half after Appellant's trial, Richardson is "on the street," while Appellant

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[15] In this regard, it may be significant that Robin Eckert attributed to Ron Richardson the comment, "We murdered 'em," when Richardson returned with the others to his house. (R811-812)

languishes on death row, awaiting the ultimate sanction that society can bring to bear.

Perhaps of even more significance than the disposition of Ron Richardson's case is the fate of Jim Acker. Richardson's testimony showed Acker to be every bit as culpable as Appellant. Acker launched the initial assault upon the residents of apartment 3301, by walking between Appellant and Richardson in order to stab Brandon Snider several times, eviscerating him, following which Acker calmly washed his hands (R434,1180-1181) And it was Acker who was the first to bound up the stairs in pursuit of the second victim, Robbie Carter. (R1182) Yet, mysteriously, at the time of Appellant's trial Acker had not even been charged with any offense stemming from his considerable participation in the murders. Although it does not appear of record, undersigned counsel has learned through a newspaper article and discussion with Appellant's trial counsel that Acker was ultimately charged with both murders and was tried and found guilty, but received life sentences.

The sentences co-defendants receive are relevant considerations for the judge and jury in determining the appropriate sentence in a capital case. Bassett v. State, 449 So. 2d 803 (Fla. 1984); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Barfield v. State, 402 So.2d 377 (Fla. 1981); Messer v. State, 330 So. 2d 137 (Fla. 1976), cert.den., 456 U.S. 984, 102 S. Ct. 2259, 72 L. Ed. 2d 863 (1982); Gafford v. State, 387 So. 2d 333 (Fla. 1980). In Appellant's case however, neither the jury nor the judge had an opportunity to consider the disposition of Jim Acker's case, nor

did they know of the ultimate disposition of Ron Richardson's case, and were not able to receive any evidence that might have shown Richardson's culpability to be greater than he claimed. This Court does have the advantage of knowing that Acker received life sentences for his eager participation in the killings, and that Richardson received a five year sentence for his role and is now a free man, and that only Pat Hannon sits on death row for these crimes. Even though Richardson and Acker were sentenced subsequent to the sentencing of Appellant, it is appropriate for this Court to consider on direct appeal, as part of its review function, "the propriety of disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. [Citation omitted.]" Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). The Court therefore can and should examine Appellant's case very closely to determine whether or not his actions justify execution of the ultimate penalty, while those of Acker and Richardson do not. If the Court will do this it must conclude that Appellant is no more culpable than the others, certainly no more culpable than Jim Acker, and, pursuant to Slater, his death sentences must be reversed. Any other result will deprive Appellant of the due process of law to which he is entitled and subject him to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitu-

tion, and Article I, Sections 9 and 17 of the Florida Constitution.[16]

[16] If this Court is not satisfied with undersigned counsel's representations concerning the disposition of Ron Richardson's case and Jim Acker's case, then Appellant suggests supplementing the record with appropriate documents from their cases. If the Court determines that it cannot consider Appellant's issue at all because it involves matters outside the record, any such determination should be without prejudice to Appellant's right to apply for post-conviction relief. Scott, 604 So. 2d at 469.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Patrick C. Hannon, prays this Honorable Court for relief as follows:

1. Reversal of his convictions and sentences and remand for new trial; or

2. Reversal of his sentences of death and remand for imposition of two life sentences; or

3. Reversal of his sentences of death and remand for a new penalty trial before a new jury impaneled for that purpose; or

4. Reversal of his sentences of death and remand for a new sentencing hearing before the court only.

Appellant additionally asks for such other and further relief as this Court may deem appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 25th day of January, 1993.

Respectfully submitted,

Robert F. Moeller

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

RFM/ddv